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FILED
SEP 28 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 149

RAY CROOKHAM, *Petitioner*

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, a Corporation, *Respondent.*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF OPPOSING PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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Under the head of "Statement of Facts" in Respondent's brief, the Petitioner is accused of making "Many erroneous statements of facts". This accusation is respectfully denied. The facts set forth in the petition substantially conform to the facts contained in the Record. It may be true that the interpretations vary, but certainly there are no intentional misstatements.

Respondent complains of the use of the terms "high bedded truck". (P. 2 Respondent's brief). Yet the Respondent's brief contains admissions from its own witnesses that the truck was high. (P. 30 Respondent's brief.).

Q. "Did you use tie tongs in loading the Sayre truck . . .?"

A. "It would have been impossible to load a truck like that with tongs."

Q. "Why?"

A. "The truck was high . . .", (P. 30, Res. brief).

The one and only reason why the Respondent here deviated from its customary method of loading ties with tongs, was because this flat and high bedded truck *stood too high above the ground* to admit of tong use. This is indicated when the Respondent's witness said:

> "It would have been impossible to load a truck like that with tongs." (P. 30 Res. brief).

The respondent subjected the Petitioner to the task of lifting ties to the higher elevation, without tongs, a situation not contributed to or produced by the petitioner. The respondent adopted the situation as its own. The assumption of the responsibility carries with it the hazards of liability.

The Respondent has attempted to explain away the holding of the cases as set forth in Petitioner's brief, such as *Webb* v. *Illinois Central Railroad Co.*, 352 U. S. 512, 1 L. Ed. 2d 503, 77 S. Ct. 451; *Ferguson* v. *St. Louis-San Fran. Ry. Co.*, 356 U. S. 41, 2 L. Ed. 2d 571, 78 S. Ct. 671, and *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443. These, together with others, comprise a definite demonstration of the quantum of proof necessary to raise a question for the jury in the Federal Employers Liability Act cases, upon the issues of "duty and notice" (Webb case), "foreseeability" (Ferguson case), "negligence and proximate cause" (Rogers case). The Respondent's interpretation placed on these and other similar cases is strained and unreal. The case of *Herdman* v. *Penn-*

sylvania Railroad Company, 352 U. S. 518, 77 S. Ct. 455, 1 L. Ed. 2d 508, is not factually in point with the case at hand. The *Rogers* case represents that line of cases defining the quantum of proof necessary to raise a question for a jury. The *Herdman* case represents that line of cases defining the situation where there is no such question. In the *Herdman* case, the plaintiff by his own testimony, forecloses any inference of negligence, and of course in such a situation it is proper to direct a verdict for the defendant. The case at Bar is in the category of the Rogers case and the ruling of that case should govern the Court's action herein.

The *Herdman* case, supra, involved injuries suffered by a freight conductor in a fall to the floor of the caboose. The 67-car train was moving through a city at 8-10 miles per hour, when an automobile loaded with school children, crossed in front of the train. The Engineer in an effort to avoid collision with the children, applied the air brakes causing a rough stop. There was no evidence that the stop was made with any special or unusual severity. There was no mechanical failure of the braking equipment. There was no failure to furnish proper safety appliances of any kind. There was no evidence to show that the unscheduled and sudden stop of the train was unusual or extraordinary. The plaintiff testified: "We got to expect them or think about them". This amounts, in substance to admission on the part of the plaintiff that there was no negligence. This Court held, "the sole issue raised is whether a jury question was presented by the evidence under the doctrine of res ipsa loquitur".

With this decision it is agreed that a jury question was not presented by the proof. The *Herdman* case proof does not even meet the liberal test laid down by this Court in *Jesionowski* v. *Boston & M. R. Co.*, 329 U. S. 452, where an "inference" of negligence was used as the basis of recovery. The facts before the Court in the case at Bar are

different from the facts in the Herdman case. Here there is proof of many and varied acts of negligence. The jury so found, and their finding should not be disturbed.

RESPONDENT'S ADMISSION OF OWN NEGLIGENCE

1. The records of this case show that this Respondent ordinarily used dump trucks in the hauling away of ties from ballast beds (R. 48, 49), with the back of the dump truck bed lowered to approximately three feet above the ground and the ties carried by two sets of tongs to the truck and shoved in endwise. That such was the custom was admitted in Respondent's brief. (P. 2, line 7). Therefore, when the petitioner here was subjected to the lifting of ties without the use of tongs to a truck bed standing one foot higher than the customarily used company truck, this is the performance of an unusual task, and amounts to negligence.

2. Respondent admits that at least throughout a third of the time consumed by the loading of the ties here in question, there was only a three-man crew working. "The facts are that at least two-thirds of the time the ties were loaded on the truck with a four-man crew." (P. 3 Res. Brief). The inevitable inference is that during the other one-third of the loading time there were only three men working. The "work buddy" of the petitioner was permitted to leave his job. Thus, petitioner was required over a third of the time consumed in the loading of the ties (nearly four hours) to do a two-man job, the like of which he had never done before. This is an admission of negligence.

3. The Respondent admits: "It is true that there were only two sets of tongs on the job". (P. 3 Res. Brief). Since there were two crews operating at one and the same time—one taking up and loading ties, the other digging holes and setting posts—and since two sets (or pairs) of tongs are

necessary before four men can carry a tie, this is an admission of an insufficient number of tie tongs. Thus, a failure to supply sufficient tools.

4. The Respondent's brief (P. 28) admits that "the foreman stayed with the other three members of the crew . . ." (The crew referred to was the one setting posts). Since there was only one foreman in the crew, there was no other supervision available for the tie loading crew. It is a known fact that the loading of cross ties, unless properly supervised, is hazardous work. *Stone* v. *N. Y. & St. L. R. Co.*, 344 U. S. 407. The mere fact that the petitioner was injured while loading ties is proof of the hazardous nature of this work. Thus, the Respondent admits the need of a foreman to supervise a crew doing non-hazardous work, (setting cross-tie posts) but it seeks to convince this Court that none was necessary in the supervision of hazardous work. This, it is believed, is an admission of Respondent's neglect of its duty, and amounts to negligence.

5. The Respondent's brief (P. 28) admits that: "Sometimes, while the truck driver and one of the crew was shoving ties forward the other three men . . . would lift the ties from the ground to the truck". This is an admission that one member of the crew left and neglected his job, and that member is shown by the Record to be Petitioner's work buddy. The Petitioner's work load was doubled during the time his buddy was gone. This added burden was new and unusual and its imposition on Petitioner amounts to negligence.

6. Respondent in its brief admits that retina detachment is more likely to occur from the tightening of abdominal muscles "when one leans over to pick up a tie . . ." (P. 18 Res. brief). It was to avoid this very hazard of strain that safety tie tongs were designed, constructed and used by the Respondent. With the use of tie tongs a four man crew can lift a tie from a standing position (the handles project

upward) and while yet standing they can shove it endwise into the rear of a tilted truck bed. The requirement here that the Petitioner load ties by hand required him to bend and strain from the lift of every tie. This produced the abdominal and systemic strain and the consequent retina detachment. Thus, again, negligence is admitted.

PETITIONER NOT OBLIGATED TO OBTAIN OWN WORK TOOLS

Respondent has devoted much time in its brief in arguing that the Petitioner was personally obliged to select and use tie tongs, even though the foreman did not require the same. Such argument violates the great array of decided cases. *Walls* v. *McKinney*, 139 W. Va. 866, 81 S. E. 2d 901; *Rogers* v. *Missouri Pacific R. Co.*, 352 U. S. 500, 1 L. Ed. 2d 493, and others cited in Petitioner's petition. To so hold would permit the invoking of the doctrines of assumption of risk and contributory negligence. These doctrines have been abolished by Statute in FELA cases and completely obliterated (Except mitigating damages by contributory negligence) by the many and repeated decisions of this Court. Thus, this part of respondent's brief should be rejected.

ONLY QUESTION, DID RESPONDENT'S NEGLIGENCE PLAY ANY PART HOWEVER SMALL, IN PETITIONER'S INJURY— AND IS THERE PROXIMATE CAUSE.

The decisions of this Court have repeatedly said that the inquiry in these cases (FELA) rarely present more than the single question whether the negligence of the employer played any part, however small, in the injury or death. This, therefore, is the only question before this Court. When both the medical and factual testimony is here considered, dis-

puted and conflicting facts are clearly apparent. This gave rise to a Jury question. The matter was submitted to the jury, not only for a general verdict, but upon Respondent's special Interrogatory. Both the general and the special verdict were in favor of the Petitioner, and against the Respondent. The verdicts are amply supported by competent evidence and should not be disturbed.

With the hope of now diminishing the effect of those two verdicts, the Respondent endeavors to present strained and unreal interpretations of the effect thereof. It seeks to diminish the effect of the jury's special verdict based upon its own propounded Interrogatory, by saying that the Interrogatory merely asks the jury if the tongs should be used at all (P. 14 Res. brief). Thus, it argues it should not be interpreted to inquire of the jury as to whether the failure to use tongs was negligence. The Supreme Court of Appeals of West Virginia accepted the Respondent's theory of this Interrogatory, and reversed the lower Court. This construction is strained and belies the real meaning and purpose of the Interrogatory. At the time this Interrogatory was propounded by Respondent, there was no question of its purpose. It hoped to obtain from the jury a decision that the failure to use tie tongs was not negligence. The opposite effect was obtained and the Respondent is now bound by a decision of its own asking.

The only way that causation or proximate cause can be proved, in a case involving an injury so technical as a detached retina, is by expert testimony—medical testimony. The Petitioner introduced Dr. Pinschmidt, an eminent eye specialist (see R. 95 for distinguished qualifications). This doctor was the petitioner's treating and operating physician and was intimately acquainted with the history and nature of the injury. He testified that the injured eye tissues were normal (R. 101). Had it not been, he would not have undertaken the eye operation (R. 107). Thus, there

was no pre-disposed condition that could have produced detachment, except the natural deterioration incident to age. The doctor testified that the lifting of the ties was the "only trauma that I could associate with any condition", (R. 112) and that he believes the lifting of the ties could have been the inciting cause of the injury. (R. 103). *The Respondent made no effort to dispute this testimony.* It must be taken at its full worth.

PETITIONER'S MEDICAL EVIDENCE MISINTERPRETED

In the Respondent's brief (P. 34, 35), it attempts to convince this Court that the Petitioner had flashes of light in his eye the night before the detached retina occurred. Respondent's argument is based on Dr. Pinschmidt's idea as to the time the injury occurred. The date of the injury was conclusively established by the Petitioner's diary, (Dec. 28, 1955) the production of which was required by the Respondent, (R. 158). The Doctor manifested his idea when attempting to interpret the history of the injury given to him by the patient. He said: "I frankly am not certain about the dates and I certainly would not want anything to hinge on them". (R. 109). Then again, he said: "That should be corrected". (R. 97).

The jury considered all the medical evidence, and the same argument as contained in the Respondent's brief was strenuously urged before the jury, and it found a verdict (both general and special) against the Respondent. Motions were made in the trial Court to set aside the verdicts, which motions (argued at length) were overruled. It is now urged that these jury verdicts should be permitted to stand.

The Petitioner's own testimony clearly and firmly indicates that he experienced no indications of eye injury prior

to the stress and strain of lifting a certain heavy tie during which he received his injury. (R. 55). It must be remembered that the Petitioner worked with a large detachment of the retina from the afternoon of the 28th of December through the 30th. The history given by the patient to his doctor could have referred to any one of these days.

RESPONDENT'S APPENDICES MISUSED

The Respondent carries in its brief an Appendix A, B, and C. When the content of these appendices are examined, it is found each is nothing more than the beginning of a new and supplemental brief. This, it is believed, is no more nor less than a subterfuge for the writing of three different briefs. It is felt that this is an imposition on the intelligence of this Court, and the Petitioner moves that the appendices be stricken from the brief and not considered. The purpose, no doubt, of this procedure is to obtain advantage of repetitious statements of the same thing, with the hope that this Court might be persuaded thereby.

INDUSTRIAL DECISIONS OF DETACHMENT OF RETINA NOT APPLICABLE

Under Appendix B of Respondent's brief are cited a number of industrial commission decisions as authority for its position here. These decisions, when read, clearly show that the only question involved is whether or not the injury received is within the language of Compensation Statutes. Of Course, negligence is never involved in any of them.

The first case cited is *R. G. Le Tourneau, Inc.*, v. *Ind. Comm.*, 396 Ill. 435, 72 N. E. 2d 183. When this case is read, it is found that the Industrial Commission made a finding of fact that the detached retina was not covered by the Work-

men's Compensation Statute and the Appellate Court refused to reverse. This is, in fact, an authority for the Petitioner here. The jury in the case at Bar made a finding of fact on Respondent's negligence and the same should not have been disturbed by the West Virginia Appellate Court.

The next case cited is *Industrial Commission of Ohio* v. *Auler*, 49 Ohio App. 12, 194 N. E. 887. When this case is examined it is found that it too is inapplicable. The Court, in quoting from *Industrial Commission* v. *Franken*, 126 Ohio St. 299, 185 N. E. 199, held "impairment of physical condition accruing from constant and continued labor no matter how heavy or arduous, is not covered by Workmen's Compensation Law. Such impairment does not come within the meaning of the term 'injury' ". It is therefore submitted that these industrial commission cases by their very nature, cannot be considered as authority in the case at Bar.

CONCLUSION

In conclusion, it is respectfully submitted that the facts of the present case as well as the law applicable thereto were fully and clearly presented to the jury. The case was defended by able counsel; counsel for the defendant was given the opportunity to argue his facts before the jury on all questions concerning the case, and it is inconceivable that counsel for the Respondent could complain of anything except that the jury failed to believe Respondent's version of the case. Facts are hard things to controvert, and it is respectfully submitted if this case were decided on the reasons given by the Respondent or the Supreme Court of West Virginia without regard to the facts as they actually exist in this case, judges would be substituted for juries. In this case there is a sufficient conflict in fact and also sufficient inferences and uncertainties in facts proven that the resolu-

tion of same was a subject exclusively for determination by the jury.

Respectfully submitted,

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Dated September 25, 1959.